



Office of the Attorney General
State of Texas

July 14, 1993

DAN MORALES
ATTORNEY GENERAL

Mr. Leonard W. Peck, Jr.
Texas Department of Criminal Justice
P.O. Box 99
Huntsville, Texas 77342-0099

OR93-460

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19629.

The Texas Department of Criminal Justice (the "department") has received a request for information relating to the Abilene, Beeville, and Beaumont Prison Projects. Specifically, the requestor seeks six categories of information:

1. Copies of all reports, including but not limited to, monthly executive summary reports, management information system reports, monthly directors' reports, and all correspondence between Mays Companies and the TDCJ related to the Abilene Prison Project, the Beeville Prison Project and the Beaumont Prison Project;
2. Copies of all reports and correspondence between Henningson, Durham & Richardson, Inc. ("HDR") and the TDCJ for the Abilene Prison Project, the Beeville Prison Project and the Beaumont Prison Project;
3. Copies of the minutes of all meetings of the TDCJ Board and the TDCJ Construction Committee from August 1, 1990 to date;
4. Copies of the pre-final and the final punchlists, certificates of beneficial occupancy, and/or certificates of final completion for the Abilene Prison Project and the Beeville Prison Project;
5. Copies of all change orders (whether agreed or unilateral) executed by the TDCJ for the Abilene Prison Project, the Beeville Prison Project and the Beaumont Prison Project; and

6. Copies of all photographs and/or videotapes taken or made of the Abilene Prison Project by the TDCJ.

You have submitted representative samples of the requested information to us for review and claim that the requested information is excepted from required public disclosure under the Open Records Act.

As a threshold matter, we must first consider whether the requested information is subject to the Open Records Act. You assert that some of the requested information is not "public information" within section 3(a) because it was not collected, assembled, or maintained by a "governmental body" as defined in the Open Records Act. You seek exception to disclosure "for documents that are the property of HDR." Ordinarily, the Open Records Act does not require a governmental body to obtain information not in its possession. Open Records Decision No. 558 (1990). For instance, a governmental body has no obligation to obtain the notes and working papers of a private firm that contracts to do a management study, if the contract requires that the private firm turn over only its final report. See Open Records Decision No. 445 (1986); see also Open Records Decision No. 492 (1988). You do not indicate, however, whether the department is in actual possession of the documents at issue, nor do you indicate whether the department's contract with HDR comments on the department's rights of access to documents generated by HDR in the course of performance. Thus your argument presents no grounds on which to withhold the requested information. Accordingly, for purposes of this ruling, we assume that the department is in actual possession of the requested information and that the contract does not prohibit access to the requested information.

Section 7(a) of the Open Records Act requires a governmental body to release requested information or to request a decision from the attorney general within ten days of receiving a request for information the governmental body wishes to withhold. You received the request for information under the Open Records Act on March 19, 1993. We received your first request for a decision in a letter dated March 24, 1993. In this letter, you timely asserted sections 3(a)(1), 3(a)(7), and 3(a)(8), and 3(a)(11) of the Open Records Act. Subsequently, in a letter dated May 4, 1993, you asserted sections 3(a)(3), 3(a)(4), and 3(a)(11) of the Open Records Act. Accordingly, with respect to sections 3(a)(3) and 3(a)(4), you failed to request a decision within the ten days required by section 7(a) of the act.

When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). Similarly, a governmental body may not raise additional exceptions after the ten-day deadline, absent a showing of compelling interest. Open Records Decision No. 515 (1988). The governmental body

must show a compelling reason to withhold the information to overcome this presumption. *See id.* Normally, the presumption of openness can be overcome only by a compelling demonstration that the information should not be released to the public, *i.e.*, that the information is deemed confidential by some other source of law or that third party interests are at stake. Open Records Decision No. 150 (1977); *see also* Open Records Decision No. 586 (1991) (law enforcement interest of third party may be compelling). We conclude, therefore, that you have waived sections 3(a)(3) and 3(a)(4).

We also remind you that the governmental body is responsible for submitting in writing the reasons it believes the requested information is excepted from disclosure. Under the Open Records Act, all information held by governmental bodies is open to the public unless it is within a specific exception to disclosure. The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body does not claim an exception or fails to show how it applies to the records, it will ordinarily waive the exception unless the information is deemed confidential by the act. *See* Attorney General Opinion JM-672 (1987). Although you timely asserted sections 3(a)(7) and 3(a)(8) of the Open Records Act, we conclude that you have not demonstrated that these exceptions apply to the requested documents.

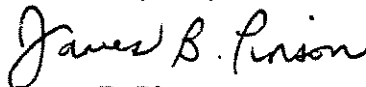
We also conclude that you have not met your burden with respect to some of the documents for which you seek closure under section 3(a)(11). You claim that attachments D and E contain "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency" under section 3(a)(11) of the act and, therefore, are excepted from public disclosure. In *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 413 (Tex. App.--Austin 1992, no writ), the Third Court of Appeals recently held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." In Open Records Decision No. 615 (1993) (copy enclosed), this office reexamined the section 3(a)(11) exception in light of the *Gilbreath* decision and held that section 3(a)(11) excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency employees as to policy issues. *Id.* at 5-6. As the information contained in attachments D and E relates to an internal administrative matter, that is, the relationship between the department and some of the companies contracted to construct department facilities, we conclude that section 3(a)(11) does not except it from required public disclosure.

Finally, you claim that "HDR and the contractors of the Abilene, Beeville and Beaumont Prison Projects may have privacy or property interests which they may wish to

defend." You do not indicate, however, which of the documents submitted to us for review implicate third party privacy or property interests. Thus, your argument presents no grounds on which to withhold the requested information. Accordingly, unless, within fourteen days of this letter, we receive additional information supporting your claim that the requested documents implicate privacy or property interests, we will presume that the requested information has been released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



James B. Pinson
Assistant Attorney General
Open Government Section

JBP/GCK/jmn

Enclosures: Open Records Decision No. 615

Ref.: ID# 19629
ID# 20006
ID# 20127

cc: Mr. Terry L. Salazar
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(w/o enclosures)